85350-9

NO. 38411-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RSUI,
Intervenor and Appellant,

v.

VISION ONE, LLC, and VISION TACOMA, INC.,
Plaintiffs and Respondents,

v.

PHILADELPHIA INDEMNITY INSURANCE COMPANY,
Defendant and Appellant,

and

D&D CONSTRUCTION, INC.;
Defendant, Third-Party Plaintiff, and Respondent,

v.

BERG EQUIPMENT & SCAFFOLDING CO., INC.,
Third-Party Defendant and Respondent.

VISION RESPONDENTS' REPLY BRIEF IN SUPPORT OF THEIR CROSS-APPEAL

Jerry B. Edmonds, WSBA #05601
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC
Attorneys for Respondents Vision One, LLC
and Vision Tacoma, Inc. and D&D, Inc.

Two Union Square
601 Union Street, Suite 4100
Seattle, WA 98111-3926
(206) 628-6600

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I. ARGUMENT IN REPLY IN SUPPORT OF FIRST CROSS-APPEAL ASSIGNMENT OF ERROR

A. Vision Preserved Its First Assignment of Error for Review.

Contrary to what Philadelphia asserts at page 17 of its Reply/Response brief, Vision's main brief[1] amply demonstrates that it preserved in the trial court its cross-appeal Assignment of Error No. 1 (misinterpretation of the Extra Expenses Endorsement).

At pages 18 (fn. 60) and 55 (fn. 128) of Vision's brief, it cited this Court to CP 6177-78, CP 6408-09 and CP 6530, and to 9/16RP 295-302 and 305, as support for its assertion that the trial court's ruling as to the endorsement's meaning, CP 7105, was made in disagreement with what Vision argued. At CP 6177-78, which are pages of a brief filed three months before trial on insurance-related issues on which the trial had reserved ruling, Vision set out the essence of the argument it makes at pages 54-56 of its prior brief:

> Vision One anticipates that Philadelphia will attempt to argue that Vision One's soft costs are limited to $1 million by reason of the Extra Expense Endorsement to the policy. Philadelphia did not raise this endorsement as a defense to or limitation on coverage in its denial letters, however, and cannot do so now.
>
> [Header omitted.] In any case, the $1 million endorsement is in addition to the $12,500,000 limit for the reasons discussed above, including the "promise to pay" discussion. Nowhere does the policy state that the $1 million is a limitation on coverage rather than a grant of additional

[1] *I.e.*, Vision Respondents' Brief in Response to Philadelphia Indemnity's Appeal and in Support of Their Cross-Appeal.

> coverage. . . . Philadelphia drafted the policy and had the opportunity to choose language that clearly limits its payment obligations, as have many other carriers. It chose not to.

CP 6408-09 are pages from a brief on insurance-related issues filed a month later, and two months before trial, in which Vision argued:

> Philadelphia ignores this Court's ruling limiting its coverage defenses to those set forth in its denial letters and argues now that the "delay" exclusion applies to exclude all of Vision One's delay damages, including lost profits. That is not, however, what Philadelphia said in its denial letters. The only mention of "consequential loss" in those letters is limited to the alleged claim for unused/destroyed concrete:
>
> > . . . *Additionally*, even if this destruction of unused concrete was considered an accidental loss to covered property, the policy specifically excludes damage arising from "loss of use. . .or any other consequential loss," *and the loss related to the unused/destroyed concrete is a consequential loss.*[2] [Italics original [to denial letter]; underscoring added [by Vision in brief being quoted].]
>
> As discussed in Vision One's opening brief [meaning CP 6157-78, and specifically CP 6177-78, quoted above], at the time of Philadelphia's denial letters, Philadelphia was well aware that part of Vision One's claim is for soft costs and indeed, those costs are referenced in Philadelphia's own letters.[3]

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[2] This footnote is included from CP 6408, in which it is footnote 47. It states: January 27, 2006 denial letter, § 3. *See also* January 3, 2006 letter at § 3, which states: "In any case, even if this destruction of unused concrete was considered an accidental loss to covered property, the policy specifically excludes damage arising from 'loss of use...or any other consequential loss' which characterizes this claim for unused concrete."

[3] This footnote is included from CP 6408, in which it is footnote 48. It states: *See, e.g.*, January 27, 2006 denial letter which states, in pertinent part, that "Vision One is now

> As has been discussed, this is consistent with the testimony of Philadelphia underwriter David Berry and Philadelphia insurance expert Andrew Shemchuk, both of whom testified that the exclusion applies only to physical losses resulting from delay, and not to financial or consequential losses.[4] [Emphasis in brief being quoted.] Because Vision One is making no claim against Philadelphia for unused/destroyed concrete, and because Philadelphia cannot now change its coverage position, Vision One requests that this Court interpret the delay exclusion as being inapplicable to any portion of Vision One's damage claim.

CP 6408-09. Vision then went on to argue at CP 6409:

> The $1 Million Extra Expense Endorsement Is A Grant Of Additional Coverage And Not a Limitation.
>
> For the reasons stated in Vision One's opening brief [again meaning CP 6157-78, and specifically CP 6177-78, quoted above], including the fact that Philadelphia's denial letters contain no mention whatsoever of the Extra Expense Endorsement and that the policy contains no language limiting Philadelphia's "promise to pay" language, as well as the fact that Philadelphia's brief contains no argument refuting Vision One's position on this issue, Vision One requests that this Court interpret the Extra Expense Endorsement as being a grant of $1 million in additional coverage, over the $12,500,000 limit of the Philadelphia policy.

CP 6409. The trial court's order agreeing with Philadelphia's position on the meaning of the endorsement, and disagreeing with Vision's, was entered on September 16, 2008. CP 7105. The order was entered at the

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making a claim for removal of debris, damage to the concrete and soft costs associated with the delay in completing this portion of the project as well as destruction of unusable material as a result of the damage and delay." (Emphasis added [in brief being quoted].)

[4] This footnote is included from CP 6408, in which it is footnote 49. It states: Berry Dep. pp. 72-73; Shemchuk Dep. pp. 38-39.

conclusion of a hearing at which Vision's counsel and the trial court engaged in the following discussion:

> If I could just briefly address the extra expense endorsement. We certainly will present evidence of far more than 1 million dollars, in these categories, that were caused by the concrete loss. So, I understand there's causation required, and we certainly have these additional, beyond what would have been expended, advertising, promotional. That will be in the evidence. We'll put that in. But our point is that these kinds of damages are not solely covered by this endorsement for 1 million dollars, and this exclusion was intended to cover, in effect, physical spoilage. I'll answer your questions.
>
> THE COURT: So let's talk about the endorsement, first. You're saying that's an additional damage on top?
>
> MR. EDMONDS: Of the 12.5 million, yes.

9/16/RP 302. This exchange also occurred at the hearing between the court and Vision's counsel:

> [THE COURT:] It says this is extra for these extra things. As long as the covered cause of loss -- and we'll say, okay, the resulting loss, that can be covered now. As long as that's covered and you meet a couple of other little things, this is an extra thing. For a million dollars, we're giving you this little extra -- for up to a million dollars.
>
> MR. EDMONDS: No question it is extra, but it doesn't mean that those same types of categories of expenses are not covered under the main form. This is an additional million dollars of coverage for these particular types of expenses. There's nothing here that says that these kinds of expenses are not covered as part of the initial 12.5 million.
>
> THE COURT: Well, I guess this is where you get in conjunction with the consequential loss.

> MR. VASQUEZ [Counsel for Philadelphia]: And I guess I would point the Court back to page 21, what that grant of coverage is. It's direct physical loss to covered property.
>
> THE COURT: Anyway, in terms of the endorsement, my reading of this and my analysis is, it's up to a million dollars on these kinds of items. If you can find someplace else in the policy that it's covered someplace else, great. But these things are up to 1 million dollars. I think that's what the endorsement's about.

9/16RP 304-05. The trial court concluded the discussion by noting (to Vision's counsel) that "You have lots to appeal." 9/16RP 307.

There is no basis for Philadelphia's argument that Vision has not demonstrated that it preserved its argument about how to interpret the extra expenses endorsement properly.

B. There Is No Confusion About the Standard of Review that Applies to a Trial Court's Interpretation of An Insurance Policy Endorsement.

RAP 2.5(a), which Philadelphia cites at page 17 of its Reply/Response brief, does not require recitation of the standard of review. Philadelphia repeatedly acknowledged in the trial court that interpretation of an insurance policy involves an issue of law.[5] Philadelphia so argued in its opening brief at p. 17 as well, citing *Overton v. Consol. Ins. Co.*, 145 Wn.2d 417, 424, 38 P.3d 322 (2002). Vision did not contest that point, because it is correct and because Vision agrees with it. The argument Philadelphia makes on the merits reflects its understanding that Vision is contending (as it is) that the trial court

[5] 5/15/RP 9-10 (*see* Vision brief at p. 14 fn. 44); 9/08RP 39-43, 45-47 (*see* Vision Brief at p. 17 fn. 56).

committed legal error by interpreting the extra expense endorsement as a policy exclusion.

C. The Extra Expenses Endorsement is Not an Exclusion.

Philadelphia's substantive response to Vision's first cross-appeal assignment of error relies on a position contrary to what its own claims witnesses acknowledged below. As Vision noted in its prior brief at page 55 (fn. 127, citing CP 6550-51, 6529-30, 13093 (71-73)), Philadelphia's claims witnesses acknowledged in discovery, under oath, (a) that the only actual delay-loss exclusion in its builder's risk policy, *see* CP 5977 (2a), does ***not*** exclude coverage for the "soft" losses due to delay that Vision claims, and (b) that the "delay" exclusion on which Philadelphia now attempts to rely does not exclude coverage for ***financial consequences*** of physical events (of which lost profits would be a classic example). As Vision explained to the trial court:

> The policy provides as follows (p. UND 000025 [which is CP 5977]):
>
> > 2. We will not pay for **"loss"** caused by or resulting from any of the following:
> >
> > a. **Delay**, loss of use, loss of market, or any other consequential loss.
> >
> > "Loss" means accidental **loss or damage**.
>
> (UND 000027 [which is CP 5979])
>
> Mr. Berry, the underwriter, testified as follows:
>
> > Q. And so the defined term "loss" that's in bold type with quotes around it, that's defined on page 27

[of the policy, *i.e.*, CP 5979] as being accidental **loss or damage, that refers to physical events rather than to financial consequences of physical events?**

A. **Yes.** [Bold type in brief being quoted.]

Mr. Shemchuk, Philadelphia's insurance expert, testified as follows:

Q. Under the heading definitions, there's a reference there to the definition of loss that's in bold type. It says it means accidental **loss or damage; correct?**

A. Yes.

Q. Handing you Exhibit 35, I'll represent to you that's the testimony of David Berry, the underwriter in this case. Have you seen that testimony before?

A. I believe so.

Q. **And do you agree with Mr. Berry as to the meaning to be attributed to loss as defined on Page 27?**

A. **Yes.** [Bold type in brief being quoted.]

Mr. Kirby, Philadelphia's Vice-President who signed the denial letters, testified as follows:

Q. -- where it says it means accidental **loss or damage**. I wanted to ask you about testimony that the underwriter gave about that definition and I've handed it to you as Exhibit 20 where he was asked this question.

As it says in Exhibit 20, "And so the defined term loss that's in bold type with quotes around it is defined on Page 27 as being accidental **loss or damage that refers to physical events rather than to financial consequences of physical events" and**

his answer was yes and I'm just asking you if you agree with that answer.

A. **Yes.** [Bold type in brief being quoted.]

CP 6550-51 (footnotes omitted); *see* CP 6545-47.

Philadelphia should not be relieved of explicit admissions contrary to the argument it now offers about its policy's delay exclusion. There *is no* exclusion for financial consequences of delay, and thus there *is no* exclusion for lost profits due to delay[6]; the extra expenses endorsement cannot be, and is not, a partial exception to any such exclusion.

The trial court thus should have held, as Vision asked it to, CP 6177-78, 9/16RP 302, 305, that the Endorsement *supplements* the policy's "pay for" coverage, and would provide up to $1 million *more* coverage for certain specified kinds of extra expenses had Vision's claim exceeded the $12,500,000 coverage limit, which did not happen. The policy itself covers the financial consequences of delay, regardless of category, subject to the $12,500,000 coverage limit. The *extra* expense endorsement was

[6] As Vision pointed out to the trial court, the policy that Philadelphia issued to Vision for the Reverie project omitted a clause standard to most Philadelphia builder's risk policies that would have enabled Philadelphia to discharge its coverage obligation in full by paying the value of lost or damaged property, paying the cost of repairing or replacing the lost or damaged property, or repairing, rebuilding, or replacing the damaged property with property of like kind and quality. CP 6176, CP 6182; 9/16/08RP 296-97. The policy's insuring clause thus conferred broad coverage by promising simply to "pay ***for***" covered losses. CP 5973 (under "A. Coverage"). A clause giving Philadelphia more options than simply paying for covered losses would have enabled Philadelphia to avoid having to pay for financial losses that Vision incurred as a consequence of the concrete slab collapse and project delay even if Philadelphia had accepted coverage. Because the policy omitted that clause, coverage for consequential financial losses cannot be denied except under a true exclusionary clause because, as Philadelphia witnesses acknowledged, the Reverie concrete slab collapse is covered unless a policy exclusion or exclusions apply. CP 13112 (46); 13092 (67-68).

not triggered because Vision's losses and claims did not reach $12,500,000.

This Court should remand for trial of the issue of whether lost profits that Vision was not permitted to prove at trial are ones it incurred because of the slab collapse and project delay. This Court should hold that Vision will be entitled to seek an additional fees-and-expenses award if it obtains an additional recovery for lost profits.

II. ARGUMENT IN REPLY IN SUPPORT OF SECOND CROSS-APPEAL ASSIGNMENT OF ERROR

Vision's first cross-appeal assignment of error is to the trial court's refusal to allow Vision to present evidence of any consequential damages other than the six types listed in the extra expense endorsement to Philadelphia's builder's risk insurance policy, CP 5985. Vision's second cross-appeal assignment of error is to the trial court's refusal to award prejudgment interest on awards the jury made for two kinds of extra expenses that the court allowed Vision to prove, *i.e.*, extra construction loan interest, for which the jury awarded Vision precisely the figure it proved and asked for, $327,607, and extra advertising/promotional expense, for which the jury likewise awarded Vision precisely the amount it proved and asked for, $305,816. Ex. 379; CP 7339.

A. Philadelphia Has Tacitly Admitted that, Once the Proper "Period of Time" for the Extra Expenses Endorsement Is Identified, the Amount Due Is "Readily Determinable," and It Should Be Held to that Admission.

Whether a prevailing party is entitled to prejudgment interest on a damages award depends on whether the recovery was "on a liquidated or readily determinable claim, as opposed to an unliquidated claim." *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986). Thus, the terms "liquidated" and "readily determinable" are used synonymously. *E.g.*, *Pederson's Fryer Farms, Inc. v. Transamerica Ins. Co.*, 83 Wn. App. 432, 452, 922 P.2d 126 (1996).

Philadelphia tacitly admitted below and does so again on appeal that the amount of Vision's extra expenses depends on what the correct "period of time" is, and that the amount is readily determinable from Vision records that both Philadelphia's and Vision's accounting experts used to add up the figures that produced the parties' competing "extra expenses" figures.

In support of its "90-day" theory on a motion for "directed verdict," Philadelphia asked the trial court to order Vision's accounting expert Paul Pederson to "rework his numbers," which Mr. Pederson had testified were based on Vision's general ledger and invoices,[7] so that his "numbers" would correspond to the 90-day period that Philadelphia contends is the correct "period of time" under the extra expenses endorsement. 10/15RP 1361-64, 1371-72.

[7] *See* CP 7362-64 and 10/1RP 831, cited at page 57, fn. 131, of Vision's prior brief.

In Philadelphia's opening brief, page 37, it argues that this Court should reduce Vision's recovery for extra expenses from $718,677 to $479,896 based on CP 7499.[8] The citation to CP 7499 is, indirectly, to sums derived by Philadelphia's accounting expert, Paul Sutphen, from Vision's records corresponding to the different and shorter period that Philadelphia contends is the correct "period of time" under the extra expenses endorsement. As one of Philadelphia's several post-trial motions explained, it was proposing to reduce Vision's recovery for extra builder's risk insurance premiums, extra advertising expense, and real estate taxes by certain amounts "based on the testimony of its forensic accountant, Paul Sutphen, *who used Vision One's own data* to calculate a 30-day delay." CP 7373 (text and fn. 11) (citing "Mr. Sutphen's chart," Ex. F, which is CP 7410).

By renewing on appeal the request to substitute Sutphen's sum for Pederson's, Philadelphia thus tacitly admits, as it did at trial, that Vision's extra expense awards were for amounts that are readily determinable once

[8] Philadelphia's proposed reduction, at CP 7499, would have affected jury awards for extra expenses in several categories, *not* including extra construction loan interest expense but *in*cluding extra advertising/promotional expense, for which Vision seeks prejudgment interest under its second cross-appeal assignment of error. Philadelphia's proposed reduction would also have affected the jury's award for extra real estate property taxes (by $64.00), on which Vision did not seek prejudgment interest, *see* CP 7349, and the jury's award for extra builder's risk insurance premiums, with respect to which the trial court awarded Vision prejudgment interest (*see* CP 9360, ¶ (1)) which is why that $71,663 extra-expense award is not a subject of Vision's cross-appeal. The point is, though, that regardless of category, Philadelphia maintained that the recoverable amount for extra expenses should have been computed by adding entries in Vision's records during the 90-day period that Philadelphia contended was the correct "period of time" under the endorsement.

we know which list of ledger entry numbers are the ones to add up. The extra expenses that Vision incurred were "readily determinable," that is, for the "period of time" advocated by *either* party. The issue for the jury was what dates bracketed the "period of time." Once the jury decided that question, the extra-expenses amounts followed either from Pederson's or Sutphen's testimony.

As explained at pages 18-19, 47-48, and 55-56 of Vision's main brief, the correct "period of time" is not the 90-day period advocated by Philadelphia; it is, instead, the different and longer period bracketed by the dates specified in the endorsement itself. Testimony supported the jury's finding that it was the dates related by Vision fact witness Stacy Kovats that bracketed the period of time, 10/14RP 69-73, 92, and the jury awarded the "readily determinable" amount that corresponds to that longer period of time, and did not award the "readily determinable" amount that would have corresponded to the shorter period of time. The awards of $327,607 for extra construction loan interest and $305,816 for extra advertising expense due to delay were "readily determinable" and thus ones on which the trial court should have awarded Vision an additional $128,817 in prejudgment interest.

B. The Assumptions Mr. Pederson Acknowledged Making Were Not Ones that Made the Jury's Awards for Extra Loan Interest and Extra Advertising Expense "Unliquidated."

Philadelphia's quotations from trial testimony in which Mr. Pederson acknowledged making "assumptions" when computing extra

construction loan interest due to the delay resulting from the slab collapse inaccurately represent the testimony he gave at trial. Mr. Pederson determined what Vision had spent based on Vision's general ledger and invoices. 9/30RP 824-28. Philadelphia does not contend that Mr. Pederson was working from unreliable records. As for "assumptions," Mr. Pederson was not a fact witness; he was an expert witness and *had* to make "assumptions" both because he lacked personal knowledge and because, once the slab collapse had occurred and the project had been delayed, it became impossible to *know,* for sure, what Vision's loan interest expense would have been had there been no collapse, other than to assume the project would have been completed as scheduled rather than later.

Mr. Pederson explained his "assumption" not only in cross-examination testimony quoted by Philadelphia, but also in his direct testimony:

> The additional construction loan interest . . . is made up of two components. One is the original bank loan with Bank of America, that had a specific term that expired during the course of construction, and which was replaced with HomeStreet Bank. We obtained the actual amount of construction loan interest that was paid under the Bank of America loan, and then we added to that the actual pro rata portion of the loan fees for the HomeStreet Bank loan that replaced that loan; remaining, outstanding balance, along with projection of what the interest is going to be upon pay off, when enough future sales were to occur. So that's the actual. The actual is a combination of actual dollars that were spent under Bank of America, and actual and projected under HomeStreet Bank. *That was then*

> *compared to what would have been paid, had the project gone according to plan, which includes a combination of both actual interest, up to the date of the collapse, and then because of the delay, we had to assume, going forward, what would have happened, because it couldn't happen that way anymore, because of the event*. So the difference between those two. Then we take those amounts. That's the -- that's the $437,000 that you see there. As a subset, *the $327,607 is that portion of those charges that occur during the time frames stated under the extra endorsement policy -- under the extra expense portion of the policy*. [Emphases added.]

9/30RP 847-49.

Philadelphia offers no authority for the proposition that use of the kind of assumption Mr. Pederson made makes a sum "undeterminable" or "unliquidated" for prejudgment interest purposes. Philadelphia's argument that an assumption makes any calculation "unliquidated" not only lacks support in the case law but is inconsistent with the case law.

In determining, after trial, whether an amount awarded by the finder of fact was "readily determinable" and thus "liquidated," a consideration for the trial judge is whether the fact finder had to use "discretion" in arriving at a damages award; if it did, the award was for an amount that is *un*liquidated. *See, e.g., Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968); *Hoglund v. Meeks*, 139 Wn. App. 854, 878, 170 P.3d 37 (2007). The classic example is where the jury had to decide what amount was reasonable. *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 537, 618 P.2d 1341 (1980), *rev. denied*, 95 Wn.2d 1002 (1981) ("A claim is unliquidated if the principal must be

arrived at by a determination of reasonableness").[9] When the reasonableness of what was spent or incurred was not the issue at trial, a dispute over whether the sums at issue are owed or not, or are owed only in part, does not operate to make the sums "unliquidated." *See Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 686, 15 P.3d 115 (2000) (holding claim liquidated because, "[o]nce liability was established . . . calculating the amount due required no discretion – it equaled the invoices for the cleanup work performed").

This is not a case in which the reasonableness of Vision's extra expenses was at issue. Philadelphia has not challenged any of the expenses Vision claimed as "extra" on the ground that the expenses were excessive or incurred imprudently. Philadelphia has contended only that Vision was seeking recovery of the wrong *set* of expenses.

Scoccolo Constr., Inc. ex rel. Curb One, Inc. v. City of Renton, 158 Wn.2d 506, 145 P.3d 371 (2006), is instructive. In that case, a contactor sued to recover the cost of delays in completing a street-widening contract. An issue on review was whether the amount awarded to the contractor had been "liquidated" for purposes of prejudgment interest. The Supreme Court held in the contractor's favor, rejecting the City's argument that it

[9] The best examples of claims that are unliquidated because determining the amount to award requires "discretion" are claims for attorney's fee awards, *see Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 773, 82 P.3d 660 (2004), and cases in which a jury has come up with a damages award between the figures suggested by the parties *and* it is not possible to determine from the evidence whether the jury accepted certain claimed items, or compromised, or arrived at its award through some other subjective method, *e.g.*, *Kiewit-Grice v. State*, 77 Wn. App. 867, 895 P.2d 6 (1995).

could not be liquidated because the jury had awarded less than the contractor claimed:

> The City argues Scoccolo's claim was not liquidated because the jury did not award the damage amount requested by Scoccolo, $935,433.27, or the amount argued by the City, $364,904.00, but rather $425,533.00. According to the City, the fact the jury awarded this sum necessarily means the jury exercised some degree of discretion, and therefore the claim is unliquidated. To bolster its argument the City cites to *Kiewit-Grice*[, 77 Wn. App. at 873], where the court stated, "[i]t is clear that the jury did not accept [plaintiff's] figure. Thus, it cannot be said that the jury did not exercise any opinion or discretion in reaching its award." . . . In *Kiewit-Grice*, the contractor sued the Department of Transportation alleging the department breached the construction contract by providing defective concrete specifications for the project, forcing Kiewit-Grice to perform additional repair work at substantial expense. The department challenged the reasonableness of the claimed expenditures, including providing expert testimony, and the court agreed the award of prejudgment interest was improper.
>
> However, . . . in this case the City did not challenge the reasonableness of the expenses submitted by Scoccolo. Furthermore, "'the sum is still 'liquidated' . . . even though the adversary successfully challenges the amount and succeeds in reducing it.' [citing *Prier*, 74 Wn.2d at 33.]" The trial court properly awarded Scoccolo prejudgment interest.

Scoccolo Constr., 158 Wn.2d at 519-520.

The *Scoccolo* court's reference to *Kiewit-Grice* further illuminates the analysis. That decision, issued in an appeal from a judgment entered in favor of a contractor for extra compensation due to defective contract

specifications, vacated a trial court's award of prejudgment interest not only because the defendant had challenged the reasonableness of the contractor's expenditures, but because it was impossible to ascertain how the jury arrived at its award:

> [The contractor] contends that the prejudgment interest award is sustainable even without consideration of the jury's methodology in reaching its verdict. It contends that it documented its extra costs by comparing the amounts needed to construct the four pontoons in Cycle II, using correct specifications, with the amounts spent constructing the four pontoons in Cycle I, using the incorrect specifications. Thus, [the contractor] argues, the jury could determine damages using this objective data and did not need to rely on opinion or discretion.
>
> The fallacy in this reasoning is that [the contractor] asked the jury for a total of $3,487,746. . . . [The defendant city] itemized the same costs and reached a total of $563,225. The jury award of $1,511,959 is between these two figures. It is not possible to know, absent the juror affidavits, whether the jury reached this figure by compromise, by using its own calculations, by deleting items, or by relying on a more subjective method. It is clear that the jury did not accept [the contractor's]. Thus, it cannot be said that the jury did not exercise any opinion or discretion in reaching its award.

Kiewit-Grice, 77 Wn. App. at 873.

Thus, the case law teaches that, where the defendant has not challenged the *reasonableness* of the expenses that the plaintiff seeks to recover, it makes no difference whether the defendant contested liability, or even that the defendant *successfully* argued that it did not owe everything the plaintiff claimed. *Scoccolo; Kiewit-Grice*. If the amount awarded bears no discernible correspondence to invoiced amounts, such that the jury may well simply have compromised between the parties'

proposed figures, it is "unliquidated." *Weyerhaeuser; Kiewit-Grice. But*, if what was awarded *does* correspond to invoiced amounts (as in *Weyerhaeuser and Scoccolo*), and the defendant did not challenge the reasonableness of what was spent or incurred, the claim *is* "liquidated."

The awards the jury made to Vision in this case for extra loan interest and advertising expenses manifestly are not the product of compromise, because the jury awarded Vision exactly what Vision proved and asked for. 9/30RP 848-49; Ex. 379. The awards also correspond to invoiced amounts, and that same correspondence (albeit to a different set of invoiced amounts) would have existed had Vision instead been awarded the extra expenses incurred during Philadelphia's 90-day "period of time." The jury's awards for those expenses thus were readily determinable and liquidated as Washington courts apply those terms. Vision is entitled to an additional $128,817 in prejudgment interest.[10]

C. Renewal of Request for Attorney Fees and Expenses on Appeal.

Pursuant to RAP 18.1(b), and under authority of *Equilon Enters., LLC v. Great Am. Alliance Ins. Co.*, 132 Wn. App. 430, 441, 132 P.3d 758 (2006), Vision requests an award of attorney fees and expenses for appeal.

[10] Philadelphia does not challenge Vision's calculation of what is owed as prejudgment interest on the extra expenses for construction loan interest and advertising expenses if those amounts are held to have been "readily determinable" and thus "liquidated."

III. CONCLUSION

For the reasons explained above and in Vision's prior brief, in addition to rejecting Philadelphia's appeal and affirming the judgment entered on the jury verdict and the trial court's award of attorney fees and expenses, this Court should rule in favor of cross-appellants and remand for two purposes: (1) for trial on the issue of whether Vision incurred the consequential losses that the trial court did not permit it to prove because of its ruling on the extra expenses endorsement, and (2) for amendment of the judgment to include an additional $128,817 in prejudgment interest. This Court should also award Vision its attorney fees and expenses incurred on appeal.

RESPECTFULLY SUBMITTED this 16th day of February, 2010.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Jerry B. Edmonds, WSBA #05601
Daniel W. Ferm, WSBA #11466

Attorneys for Respondents Vision One, LLC, Vision Tacoma, Inc. and D&D, Inc.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 16th day of February, 2010, I caused a true and correct copy of the foregoing document, "Vision Respondents' Reply Brief In Support of Their Cross-Appeal," to be delivered by U.S. mail, postage prepaid, to the following counsel of record:

Counsel for Appellant Philadelphia Indemnity Ins. Co.:
J. Dino Vasquez, WSBA #25533
Thomas D. Adams, WSBA# 18470
Celeste M. Monroe, WSBA #35843
KARR TUTTLE CAMPBELL
1201 3rd Ave Ste 2900
Seattle WA 98101-3028

Counsel for Appellant RSUI:
Michael D. Helgren, WSBA #12186
David R. East, WSBA #31481
Barbara H. Schuknecht, WSBA #14106
MCNAUL EBEL NAWROT & HELGREN PLLC
600 University St Ste 2700
Seattle WA 98101-3143

Counsel for Respondent Berg Equipment & Scaffolding Co., Inc.:
Daniel F. Mullin, WSBA #12768
Tracy A. Duany, WSBA #32287
MULLIN LAW GROUP PLLC
101 Yesler Way, Suite 400
Seattle WA 98104

Counsel for Respondent Berg Equipment & Scaffolding Co., Inc.:
Dennis J. Perkins, WSBA #05774
ATTORNEY AT LAW
1570 Skyline Tower
10900 NE 4th St
Bellevue WA 98004-5873

DATED this 16th day of February, 2010, at Seattle, Washington.

Carrie A. Custer

Carrie A. Custer